SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 489

PITTSBURGH PLATE GLASS COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Opinion Below.

The opinion of the Court of Appeals is reported at 260 F. 2d 397. No opinion was filed by the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 6, 1958 (R. 858-9). The petition for certiorari was filed on November 3, 1958 and granted on December 15, 1958. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) (1952).

Statutes and Rule Involved.

The conviction was under §1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §1 (1952), printed in full as Appendix A.

The so-called *Jencks* statute, 18 U. S. C. §3500 (Supp. V, 1958), although basically irrelevant, was discussed by the Court of Appeals. It is printed as Appendix B.

Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. (Supp. V, 1958), is printed as Appendix C.

Question Presented.

The question presented is that to which this Court limited the grant of certiorari:

> In the trial of a federal criminal action, when the principal witness for the prosecution stated that he had testified three times before the indicting grand jury upon matters covered by his testimony at the trial, was it reversible error for the trial judge upon motion duly made to deny to the defendants, for use in cross-examination, inspection of the transcript of the grand jury testimony of that witness?

Statement.

Background facts.

On March 26, 1957 an indictment was returned by a federal grand jury in Roanoke, Virginia. It charged the petitioner Pittsburgh Plate Glass Company ("PPG"), six other corporate defendants, and three individual defendants with a conspiracy in violation of §1 of the Sherman Act to fix the prices to furniture manufacturers of plain plate glass mirrors sold in Virginia and North Carolina (R. 692-7). One of the individual defendants was PPG's manager of

plate glass sales, W. A. Gordon, who was acquitted on motion at the close of the Government's case (R. 301-2). He was the only defendant acquitted.

The trial began on November 18, 1957. The Government's case related to the events of a single week, from October 25 to November 1, 1954, and the Government disclaimed any proof of a continuing conspiracy (R. 71, 78).

The principal prosecution witness was A. G. Jonas (R. 849). His was the testimony by which the Government sought to tie PPG to the alleged conspiracy (R. 849-51).

Jonas was the president of Lenoir Mirror Company, a large mirror manufacturer (R. 181). He was not indicted. Nor was his company indicted (R. 231, 274). Yet he testified at the trial and presumably before the grand jury that he effectuated the alleged conspiracy: "I was the stumbling block. There would not be any increase if I didn't agree to do so" (R. 237).

The Government presented testimony about the 1954 annual meeting of the Mirror Manufacturers Association at Asheville, North Carolina. PPG was not a member of the Association. PPG's prime interest in the mirror trade was to sell plate glass to mirror manufacturers, who process the glass by applying silver and protective coatings to one side (R. 849).

The acquitted defendant, W. A. Gordon, manager of plate glass sales for PPG, and three members of his department attended the Association meeting (R. 119). They went there to see their customers, who were eager to have information about the "glass shortage" (R. 171, 220-1, 316). They were the only PPG employees present (G. Ex. 65, R. 118, 618).

PPG makes mirrors in a small way at its High Point, North Carolina, warehouse (D. Ex. 15, R. 76, 645)—only

3.9% of the defendants' 1954 combined sales.* It was by reason of a single price announcement from this warehouse that the trial court submitted PPG's case to the jury (R. 474-5).

There was talk of raising prices among some of the mirror manufacturers present at the Asheville meeting.** For some time prior to the meeting there had been a severe mirror price war incident to a slump in the furniture and mirror business (R. 35-6, 850). However, by the fall of 1954, an upswing in mirror prices was imminent because of a shortage of plate glass coincident with an increasing demand for mirrors by furniture manufacturers (R. 850).

Prejudicial nature of A. G. Jonas' testimony.

On November 1, 1954, the manager of the PPG High Point warehouse issued form letters announcing a price increase to 78% off list—the price announcement mentioned above (R. 58). This announcement came three days after other defendants and Lenoir Mirror Company had issued price-increase announcements of the same amount on October 29, 1954 (R. 851; G. Ex. 90, R. 250, 634).

The Government's attempt to relate the unilateral action of the High Point manager to the alleged conspiracy rests entirely upon the testimony of A. G. Jonas.

First, Jonas, who was not a member of the Association and not present at the Asheville meeting, received a tele-

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* This figure is calculated from G. Ex. 15, R. 538; G. Ex. 23, R. 541; G. Ex. 27, R. 552; G. Ex. 28, R. 555; G. Ex. 36, R. 559; G. Ex. 42, R. 564; and D. Ex. 15, R. 76, 645.

** Mirrors are a fungible product, and in the mirror industry a list and discount method of pricing is used. List prices are uniform, being based upon some 2,000 different sizes and shapes of mirror (G. Ex. 61, R. 60, 585-609). The actual selling prices of a manufacturer are quoted as a discount, or a series of discounts, off list. At the time of the 1954 meeting, the prevailing basic discount was 80%. Thus a rise in prices would involve a lowering of the discount, for example, to 78% off list (R. 175-6).

phone call from representatives of defendants (not including PPG) present at the meeting. They told him that John Messer, Sr., a defendant and officer of two corporate defendants, was going to raise his price to 78% off list (R. 219). Jonas expressed disbelief since Messer "was well known in the industry as a price-cutter" (R. 850). In the language of the Court of Appeals:

> "Jonas requested that someone relay a message to PPG's Gordon to call him. Jonas testified that his purpose was to learn 'if there was any truth in this matter.' Gordon replied that '(i)n some of the rooms' he had 'heard the fellows saying that they would like to get their prices increased,' and although he wasn't trying to tell Jonas what he should do or not do, he thought that Jonas 'ought to be getting more for the product than we were getting for' it" (R. 850).

Notwithstanding Gordon's acquittal by direction of the trial court, this testimony of Jonas was argued to the jury and to the trial court and to the Court of Appeals in support of the Government's attempt to tie PPG's November 1, 1954, price announcement into the alleged conspiracy (*e.g.*, R. 437).

Secondly, Jonas testified that on October 29 and November 1, 1954, he telephoned a subordinate of Gordon's in Pittsburgh, Sam J. Prichard, about a meeting that some of the defendants, not including Gordon or any PPG representative, had held on October 28 at an inn called "The Bluffs" (R. 248-9). Prichard denied that this meeting was ever mentioned in any of Jonas' not unusual telephone calls to Pittsburgh about plate glass orders (R. 303-6; G. Ex. 89, R. 240, 630-3). PPG was "the supplier" of plate glass to Lenoir Mirror Company (R. 238).

Jonas, describing the meeting at "The Bluffs" (PPG not present or represented—R. 241-2), said that he and representatives of the defendants attending "agreed that 78 percent was a fair price and we would go along on that basis" (R. 244). He testified that everyone present agreed to send out letters on October 29, 1954, announcing the increase (R. 245). The Court of Appeals summarized his testimony on the calls to Prichard:

> "Jonas said that he would report the outcome of the metting (sic) to PPG. Accordingly, he reached Sam Prichard, Gordon's assistant, by phone on October 29, and Jonas' testimony was that he told Prichard of the agreement reached at The Bluffs and requested him to notify his superior in PPG, Gordon. Jonas further asserted that in a phone conversation with Prichard on November 1, the latter reported that the message had been conveyed to Gordon. Prichard denied emphatically any such calls from Jonas. The telephone bills of Lenoir Mirror Company, Jonas' employer, showed calls to PPG on the two dates on which Jonas claimed to have talked to Prichard. The telephone bill also showed additional calls to PPG during November" (R. 850-1).

Jonas' testimony stands in the record wholly uncorroborated.

The motion to inspect Jonas' grand jury testimony.

At the close of Jonas' direct examination, the following motion to inspect his grand jury testimony was made:

> "Q. Mr. Jonas, did you testify before the Grand Jury in Roanoke in 1956? A. Yes, sir.
>
> "Q. Did you testify before that Grand Jury more than once? A. Yes, sir.

"Q. How many times did you testify before the Grand Jury? A. Three times.

"Q. Three times. Can you give us those dates? A. I cannot, sir.

"Q. Would you say that your testimony before the Grand Jury covered in general approximately the same subject matter as your testimony here at the trial?

"Mr. Karp: I object, your Honor.

"The Court: Was your testimony on the same general subject matter?

"The Witness: It was, sir.

"Mr. Gilmer: That is all.

"Mr. Humrickhouse [trial counsel for PPG]: Now, your Honor, I move for the formal production of the Grand Jury transcript of this witness' testimony.

"The Court: The motion is denied. That is all, Mr. Jonas" (R. 263-4).

This ruling had been forecast by the trial court in a preceding colloquy:

"Mr. Humrickhouse: Then I want to move for the production of the Grand Jury minutes.

"The Court: Exactly what I thought you were, and you are not going to get them" (R. 259).

The following summarizes the record on the trial court's rejection of the motion:

(1) The court ruled that production would not be required unless the defendants could show "some sound basis that contradicts between • • • his testimony before the Grand Jury and his testimony in this trial" (R. 259).

(2) The court understood that the motion was limited to testimony "regarding the subjects to which he has testified on direct examination" (R. 259, 262).

(3) The court had in mind that counsel for the Government "had analyzed the Grand Jury transcript and made notes for his use in direct examination of his witness [Jonas]" (R. 260), as had previously been stated by Government counsel (R. 251).

(4) The court had the benefit of citations to *Jencks* v. *United States*, 353 U. S. 657, and *United States* v. *Rosenberg*, 245 F. 2d 870 (3d Cir. 1957), but held them not controlling, apparently on the basis of the so-called *Jencks* statute, 18 U. S. C. §3500 (R. 261-2).

At the close of the trial on December 3, 1957, the jury returned a verdict of guilty as to all the defendants (R. 518-9) other than W. A. Gordon, who had already been discharged (R. 302). A fine of $4,000 was then imposed upon PPG (R. 530, 722-4).

The decision of the Court of Appeals.

The Court of Appeals sustained the conviction in the following language:

> "Since conscious parallel business behavior *per se* does not establish a violation of the Sherman Act, *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954), *affirming* 201 F. 2d 306 (4 cir., 1953), proof that PPG announced a price rise identical with that announced almost simultaneously by its competitors was not enough by itself to convict. However, PPG 'conscious parallelism,' in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators" (R. 851).

As the statement of the facts in the Court of Appeals opinion shows, PPG's "apparent close connection with the

climax of the conspiracy" depended entirely on the testimony of A. G. Jonas (R. 849-51).

In upholding denial of inspection of Jonas' grand jury testimony, the Court of Appeals, in summary, held:

1. That production of grand jury testimony is governed by Rule 6(e), unaffected by *Jencks* v. *United States* or 18 U. S. C. §3500 (R. 855-6).

2. Further, that the practice which has been adopted under Rule 6(e) "does not contemplate the delivery of the transcript to defense counsel without any prior inspection by the Judge", and that "this tradition of the law is not to be abandoned without clear legislative direction" which "Section 3500 does not profess to make" (R. 857).

3. And finally, the Court of Appeals held that the judge may inspect the transcript without a prior showing of inconsistency and bring "inconsistency" as distinguished from "inconsequential deviations" to the attention of the cross-examiner, but ordinarily he should not do so because of the burden on the court, interruption of the trial, the court's possible inability "to absorb and evaluate every nuance in an extensive transcript", and the court's involvement in "the partisan task of preparing cross-examination" (R. 857-8).

Summary of Argument.

I. In *Jencks* v. *United States*, 353 U. S. 657, this Court held that for use in cross-examination the defendant was entitled to production of the reports to the Federal Bureau of Investigation made by two F. B. I. undercover agents who subsequently testified for the prosecution. This decision held that relevancy and materiality of the reports are established by showing, without more, that the reports

relate to the testimony of the witness; that to require a preliminary showing of conflict or inconsistency would be "clearly incompatible with our standards for the administration of criminal justice in the federal courts"; and that "justice requires no less" than that the defendant himself inspect the reports rather than having the trial court look for conflicts or inconsistencies. A claim of executive privilege was rejected, this Court holding that the burden was the Government's to decide whether the public prejudice of letting the crime go unpunished was greater than that attendant upon possible disclosure of state secrets or other confidential information. In the present case, the grand jury testimony of the principal witness for the prosecution on the subject matter of his trial testimony should have been produced under the *Jencks* rule, unless grand jury minutes are exempt from the "standards for the administration of criminal justice" enunciated in *Jencks*.

II. A. None of the reasons for grand jury secrecy applies to the witness who subsequently testifies in open court for the prosecution on subject matter the same as that of his grand jury testimony. Even the oft-mentioned policy of encouraging free disclosures to grand juries by the cloak of secrecy fails in this case because the Government itself has removed the cloak by calling the witness. This case is like that of the temporary privilege as to an informer's identity—a privilege which ceases once the informer becomes known, *Roviaro* v. *United States*, 353 U. S. 53, 59. To continue to preserve secrecy would be to encourage perjury. If the witness' grand jury testimony contains anything different from his testimony on the same subject matter at a subsequent trial, this is precisely the inconsistency which the defendant is entitled to develop on cross-examination.

B. The trial court both traditionally and under Rule 6(e) has discretion to order disclosure of grand jury testimony. The standard, as stated in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234, is that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." It has long been recognized that where a defendant can by some method show a conflict, disclosure for use in cross-examination is proper. The *Jencks* rule has eliminated the necessity for a prior showing of conflict or inconsistency.

C. *United States* v. *Rosenberg*, 245 F. 2d 870 (3d Cir. 1957), was correct in applying the *Jencks* decision to grand jury testimony, and conflicting decisions such as *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958), and the decision below should be corrected. The present case is precisely that of a "particularized need" for disclosure to which this Court referred in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 683.

D. The many criminal cases in which access to the grand jury transcript on motion of a defendant seeking to overturn the indictment has been refused relate to the orderly administration of justice rather than to grand jury secrecy as such. They are not relevant to the present case.

E. The so-called *Jencks* statute, 18 U. S. C. §3500, is also irrelevant. On its face it does not apply to grand jury testimony, and the legislative history shows that it was not intended so to apply.

III. A. The testimony here at issue was that of A. G. Jonas, the principal witness for the prosecution, the only witness whose testimony purported to connect PPG to the conspiracy charged in the indictment. His testimony on a vital point was flatly contradicted by a defense witness,

and stood wholly uncorroborated. In addition, the trial court protected Jonas by limiting examination and by instructions to the jury. There can be no question in this context that PPG was severely prejudiced by denial of access to his grand jury testimony for use in cross-examination. The "ends of justice" clearly required disclosure.

B. The grand jury having completed its proper work, to seal in secrecy from the accused the testimony of a witness subsequently called by the prosecution is to give that testimony the status of a deposition used by the Government in direct examination but not available to the accused for cross-examination. Such a double standard violates the requirements of justice.

C. Grand jury transcripts are court papers to which no executive privilege applies. Therefore, if executive files must be disclosed for use in cross-examination, a fortiori grand jury testimony must be disclosed for that purpose. If "justice requires no less" than the production of F. B. I. reports of Government witnesses, as the *Jencks* case holds, certainly "the ends of justice require", in the language of the *Socony-Vacuum* case, the disclosure of the grand jury testimony of the Government's principal witness on the same subject matter as that of his trial testimony.

ARGUMENT.

POINT I.

THE STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE SET FORTH IN *JENCKS* v. *UNITED STATES* REQUIRED PRODUCTION OF THE GRAND JURY TESTIMONY OF THE PRINCIPAL WITNESS FOR THE PROSECUTION.

If the transcript of the sworn testimony of A. G. Jonas on the subject matter of his trial testimony had been obtained by counsel for the Government by some method other than the grand jury process—if, for example, his deposition had been taken *ex parte*—there can be no question that PPG would have been entitled to that transcript for use in cross-examination. This proposition has been conclusively established by this Court's decision in *Jencks* v. *United States*, 353 U. S. 657.

The *Jencks* decision has evoked a great deal of comment, some of it unfavorable; yet it was but one additional example of the growing recognition by the courts that in a criminal case evidentiary materials should not be withheld from a defendant merely because the prosecution had them and did not want to give them up. Other milestones along the road to more even-handed justice were *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *United States* v. *Gordon*, 344 U. S. 414; *United States* v. *Reynolds*, 345 U. S. 1, 12.

The *Jencks* case presented the issue of whether the defendant might have, for use in cross-examination, access to reports previously made to the F. B. I. by two witnesses for the Government without laying a preliminary foundation of conflict or inconsistency. In holding that the defendant had the right to inspect "all reports of Matusow and Ford in its [the Government's] possession, written and,

when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial" (p. 668), this Court ruled:

1. In order to inspect the reports the defendant need not lay a preliminary foundation of conflict.

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon*, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United States in a criminal prosecution '. . . is not that it shall win a case, but that justice shall be done. . . .' *Berger* v. *United States*, 295 U. S. 78, 88" (pp. 667-8).

2. A sufficient foundation is laid by testimony of the witnesses "that their reports were of the events and activities related in their testimony" (p. 666). The necessary essentials of a foundation are that the demand was for "specific documents", and not for statements of persons "not offered as witnesses" (p. 667).

3. The defendant is entitled to inspect the reports to decide whether to use them.

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less" (pp. 668-9).

4. The rights of a defendant are not satisfied by having the trial judge inspect the reports.

> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant" (p. 669).

This rule applies even though the defendant had asked only for inspection by the trial court (concurring opinion, p. 673, fn. 1).

5. Executive privilege is no excuse for non-production.

> "But this Court has noticed, in *United States* v. *Reynolds*, 345 U. S. 1, the holdings of the Court of Appeals for the Second Circuit that, in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .' 345 U. S. at 12" (pp. 670-1).
>
> • • • • • •
>
> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of

state secrets and other confidential information in the Government's possession" (p. 672).

There can be no argument that the transcript of Jonas' testimony, putting to one side the fact that it was before a grand jury, wholly fulfills every requirement of this decision. Indeed, if this were the transcript of an *ex parte* deposition, it would fall within the scope of 18 U. S. C. §3500(e) as "a stenographic • • • transcription • • • which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement". That the testimony was before a grand jury in no way lessens its "relevancy or materiality". If the trial court is to be upheld, it must be upheld upon an exclusionary principle so strong as to override the "standards for the administration of criminal justice" which this Court has announced.

POINT II.

THE TRADITIONAL SECRECY OF GRAND JURY PROCEEDINGS AFFORDED NO BASIS FOR DENYING THE PETITIONER INSPECTION OF THE GRAND JURY TESTIMONY OF THE PRINCIPAL PROSECUTION WITNESS.

A. The reasons for grand jury secrecy.

The grand jury, as this Court stated in *Costello* v. *United States*, 350 U. S. 359, 362, is "an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders." It is "'a judicial inquiry' • • • of the most ancient lineage," *Cobbledick* v. *United States*, 309 U. S. 323, 327.

Grand jury proceedings have traditionally been conducted in secret, and perhaps because of the age of the

institution there has been some tendency in the bench and bar to accept the thesis that the secrecy of grand jury proceedings is sacred without analysis of the reasons for secrecy or the proper limits of the concept of secrecy.

The traditional reasons for secrecy, however, are precisely limited and are inapplicable in the present case. They are:

> " '(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.' "

United States v. *Procter & Gamble Co.*, 356 U. S. 677, 681-2, fn. 6.

A number of decisions and other materials set forth what is known of the origin and development of the grand jury. See, *e.g.*, *Hale* v. *Henkel*, 201 U. S. 43, 59; *Blair* v. *United States*, 250 U. S. 273, 279; *United States* v. *Smyth*, 104 F. Supp. 283 (N. D. Cal. 1952); 4 *Blackstone Commentaries* 301-307; 8 Wigmore, *Evidence* §2360 (3d ed. 1940); Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F. R. D. 331 (1955). None of these materials suggests reasons for secrecy additional to the five quoted above.

The question, then, is whether any of these five reasons under the circumstances of the present case is so powerful that the public interest in the preservation of the secrecy of Jonas' testimony required the "standards for the administration of criminal justice" announced by *Jencks* to be set aside by the trial court.

Now that the indictment has been returned, the grand jury has long since been discharged, and the witness has testified at the subsequent trial, not even the fourth reason applies:

> "(4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes."

Yet it is solely upon this reason that the Government has relied in opposing production of Jonas' testimony.

However, once the grand jury witness has testified at the trial, to the extent that he covers the same subject matter, all secrecy of his grand jury testimony has been destroyed. The Government has destroyed it by calling him.

The situation is precisely the same as with the identity of an informer. In *Roviaro* v. *United States*, 353 U. S. 53, 59-60, this Court said:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States*, 305 U. S. 251, 254; *In re Quarles and Butler*, 158 U. S. 532; *Vogel* v. *Gruaz*, 110 U. S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of

the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

"The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable."

So here to the extent that grand jury secrecy is designed "to encourage free and untrammeled disclosures", once those disclosures have been made public at the trial "to those who would have cause to resent the communication", the occasion for secrecy is gone.

The only argument for continuance of secrecy after the witness has testified at the trial necessarily comes down to a plea for the protection and encouragement of perjury. The analysis of the problem in Wigmore at §2362 is unassailable:

"The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony. The policy is analogous to that of the privilege for informers in general (*post*, §2374).

• • • • • • •

"But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt

witness would be able to utilize it for perjured charges. This much is now universally conceded:

> • • • • • •
>
> "But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:
>
> "(1) Supposing the grand jury to *indict* J. S. on Doe's testimony, it is plain that secrecy is no longer of any avail, for Doe will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill-will) which his testimony on the open trial does not equally tend to produce. If, on the other hand, he now testifies falsely, or if he testifies truly but formerly falsely, he is in no way a person who ought to have any privilege. The privilege therefore has no longer any reason to exist."

To the same effect see Note, *The Impact of Jencks* v. *United States and Subsequent Legislation on the Secrecy of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245 (1958); *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 201 (D. N. J. 1955); American Law Institute, *Model Code of Evidence*, Rule 229, Comment (1942).

Thus the only thing that Jonas' grand jury testimony can contain that his trial testimony on the same subject matter did not contain is precisely that inconsistency, intentional or otherwise, which PPG might have used to impeach him. Applicable here is the language of this Court in *United States* v. *Gordon*, 344 U. S. 414, 419:

> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation

that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' "

None of the reasons for grand jury secrecy being applicable in the present case, and the defendant having been relieved by *Jencks* of the necessity for a prior showing of conflict or inconsistency, Jonas' grand jury testimony should have been produced for inspection.

B. The standards for disclosure of grand jury testimony.

It has long been recognized that disclosure of grand jury testimony is wholly proper where sufficient cause is shown. Rule 6(e) specifically places disclosure within the discretion of the district court in the following language:

> "Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding • • •"

The Advisory Committee Note to this section says:

> "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure."

This "traditional practice of secrecy", however, recognized many bases for disclosure. The general rule is that which this Court stated in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4:

> "Grand jury testimony is ordinarily confidential. See Wigmore, *supra*, § 2362. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

See also *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908).

Disclosure of specific grand jury testimony has been ordered in a number of cases for various reasons, *e.g.*, *Doe* v. *Rosenberry*, 255 F. 2d 118 (2d Cir. 1958) (grand jury testimony of a member of the bar subject to disciplinary proceedings); *In the Matter of Special 1952 Grand Jury*, 22 F. R. D. 102 (E. D. Pa. 1958) (grand jury testimony of a plaintiff in a subsequent treble-damage antitrust proceeding); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, E. B. D. 58-32S (D. Mass., May 9, 1958) (grand jury testimony of a plaintiff in a subsequent treble-damage antitrust proceeding); *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D. N. J. 1955) (grand jury testimony of defendants under the False Claims Act); *In re Bullock*, 103 F. Supp. 639 (D. D. C. 1952) (grand jury testimony of a police inspector under investigation for dereliction of duty); *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa. 1933) (grand jury testimony relevant in a proceeding to revoke a beer permit).

It has long been recognized that, where by some method the defendant can show a contradiction between a witness' testimony at the trial and his grand jury testimony, the defendant may then have access to the inconsistent grand jury testimony for use in cross-examination; and the rule of secrecy does not prevent this. See *United States* v. *Alper*, 156 F. 2d 222, 226 (2d Cir. 1946); *Herzog* v. *United States*, 226 F. 2d 561, 566 (9th Cir. 1955), *cert. denied*, 352 U. S. 844. We doubt that the Government here will quarrel with the proposition that if a contradiction were known to exist between Jonas' trial testimony and his grand jury testimony, then the "ends of justice" would have required that PPG have access to the grand jury testimony. But under the practice prior to *Jencks* about the only way a contradiction could be uncovered was to have the trial court look for

it. This procedure was filled with the drawbacks of burden and involving the court in partisan cross-examination to which the *Alper* and *Herzog* opinions referred, as well as the Court of Appeals in the present case (R. 857-8).

It was just this blockade which this Court swept away in *Jencks* by holding that the defendant had the right himself to inspect F. B. I. reports, without a prior showing of inconsistency. This same standard must necessarily apply to grand jury testimony. Accordingly the "ends of justice" now require that grand jury testimony be disclosed for the defendant's use on cross-examination.

C. Conflict among the decisions.

Following the *Jencks* decision two Courts of Appeals considered the problem of grand jury testimony prior to the decision of the Court of Appeals in the present case. The Third Circuit in *United States* v. *Rosenberg*, 245 F. 2d 870 (3d Cir. 1957), treated grand jury minutes as on a par with F. B. I. reports and reversed the trial court for examining them both *in camera* rather than ordering production as requested by a defense motion. We submit that this is the only rational result under the *Jencks* case. An objective view of the matter is stated in the note previously cited, 27 Fordham L. Rev. 244, 254 (1958):

> "In sum, it is submitted that the *Rosenberg* case in the Third Circuit was in strict conformity with the spirit if not the letter of *Jencks* when it held that grand jury minutes are within the rule. There can be no greater reason to protect grand jury minutes than statements to the FBI. • • • In the final analysis the new rule is not so devastating a change as it first appears. The defendant has always been allowed to impeach a witness by prior contradictory statements to the grand jury. The rule as changed

would remove the irrational stumbling block of first showing inconsistency and allow the accused to see the testimony to determine if there is an inconsistency."

The Second Circuit has reached a conflicting and anomalous result, typified by *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958), which reflects views also expressed in *United States* v. *Angelet*, 255 F. 2d 383 (2d Cir. 1958), *cert. denied*, 355 U. S. 859, and *United States* v. *Consolidated Laundries Corp.*, 159 F. Supp. 860 (S. D. N. Y. 1958). Perhaps because of an incorrect analysis of the effect of 18 U. S. C. §3500, a problem considered below, the Second Circuit has refused to depart from the prior practice of inspection by the trial judge before permitting the defendant access. The only branch of the *Jencks* decision adopted in *Spangelet* is that which eliminates the necessity for the defendant to show an inconsistency in order to get inspection even by the trial court (258 F. 2d 341). An indication of one defect in this practice is that the Court of Appeals in that very case found an inconsistency which the trial court did not find. Of particular significance is the following statement in the opinion:

> "In passing the point, however, we suggest that a prosecutor, who by opposing a defendant's access to grand jury minutes casts the burden of comparison upon the court, owes the court his own best effort himself to locate inconsistencies and the duty of calling to the attention of the court answers which might be classified as inconsistent. For the prosecutor has had an opportunity to absorb the content of the grand jury minutes before trial and thus is in a better position than the judge to spot inconsistencies with the testimony on trial as it develops. We also observe that in this case this error would never have occurred if the prosecutor on request had provided the defense,

as the judge suggested, with a copy of the witness's grand jury testimony" (258 F. 2d 342).

This comment leaves one puzzled as to why the Second Circuit after making such a good case for the *Jencks* rule did not adopt it. The Court obviously was of the view that the prosecutor should have produced the testimony. But under Rule 6(e) it is the trial court which has control of grand jury testimony, not the prosecutor. As developed below, grand jury transcripts are court papers, not prosecution papers. Also, to leave to the *prosecution* the discretion to identify inconsistencies is scarcely consistent with the "ends of justice."

In any event, even by this Second Circuit standard, which we submit is erroneous, the trial court in the present case erred. He refused any production in the absence of a showing by the defendants of a contradiction (R. 259). Also, he did not himself inspect for contradictions as the Second Circuit would have required though it would not have been sufficient had he done so, particularly in view of his obvious predisposition to find contradictions "immaterial" (R. 422-3, 481).

The Court of Appeals in the present case has retrogressed to a position anterior even to that of the Second Circuit, *holding that grand jury testimony should not be produced without prior inspection by the trial court, and that ordinarily the trial court should not inspect.* Obviously under this decision a defendant would have the insupportable burden of showing conflict without the means of showing it, and perhaps he would not even then gain access. This is certainly wrong if *Jencks* governs, and it is wrong even under the watered-down Second Circuit view of *Jencks.*

The reconciliation of *Jencks* with grand jury secrecy has been touched upon by this Court in the recent case of *United States* v. *Procter & Gamble Co.*, 356 U. S. 677. That decision refused blanket pretrial discovery of grand jury testimony in a civil action on the basis that secrecy of grand jury proceedings should not be broken except where there is a "compelling necessity" which must be "shown with particularity" (356 U. S. 682). The opinion says further:

> "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.[7] Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.
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> • • • • • • •
>
> "[7] See, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. Cf. *Jencks* v. *United States*, 353 U. S. 657" (356 U. S. 683).

It would be hard to picture a case of more particularized need than the present one. At issue is the testimony of the only Government witness whose testimony purported in any way to connect PPG to the conspiracy for which it was convicted, the testimony of a self-confessed conspirator who was not indicted, and that testimony emphatically contradicted by another witness on a vital point. Clearly there was here a compelling necessity; clearly the "ends of justice" required disclosure at the trial for use in cross examination.

D. Inapplicability of cases involving attacks on the indictment.

Discussions of grand jury secrecy are often confused by a line of cases which, properly speaking, have little to

do with the subject. In fact, a good deal of the somewhat mystical acceptance of "secrecy" as a synonym for "grand jury" stems from these cases. These are the cases in which a defendant seeks to comb through the entire grand jury transcript looking for a basis on which to attack the indictment.

This Court has considered the problem in two recent opinions, *Lawn* v. *United States*, 355 U. S. 339, and *Costello* v. *United States*, 350 U. S. 359, in both of which the Court refused to go behind the indictment to consider the evidence on which it was based. In *Costello* v. *United States* the following language is pertinent:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury" (350 U. S. 363).

It is apparent that the salutary principle that a court should not have to try every case twice, once to review the indictment and again on the merits, has nothing to do with grand jury secrecy as such. It is, rather, a question of the orderly administration of justice. However, some decisions have tended to confuse the two questions and denied a review of the indictment on the basis of grand jury secrecy. It is significant, however, that the leading earlier case on this matter, *United States* v. *Garsson*, 291 Fed. 646 (S. D. N. Y. 1923), does not advert to the issue of secrecy at all. Yet subsequent cases in discussing the question of secrecy refer to Judge Learned Hand's famous statement in which

he refused discovery of the grand jury transcript in the hunt for errors:

> "It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will" (291 Fed. 649).

It is true that one method of turning aside attacks on, for example, the constitution of a grand jury is by reference to "the indispensable secrecy of grand jury proceedings", as was done in *United States* v. *Johnson,* 319 U. S. 503, 513. However, the point in that case was not really secrecy as such but the impropriety of the attack, and any reliance on "secrecy" in that context can have no relevance to the use at the trial of grand jury testimony for cross-examination.

Accordingly, the many cases in which courts have refused to permit inspection of grand jury transcripts for the purpose of attacking the indictment are of no significance to the present issue.

E. Irrelevance of 18 U. S. C. §3500.

The Government (brief in opposition, p. 16), the Court of Appeals (R. 855-6) and PPG all agree that the only codified basis for exercise of the trial court's discretion with regard to disclosure of grand jury testimony is that contained in Rule 6(e). This was true before the *Jencks* decision; it was true after the *Jencks* decision; and it is true today after the enactment of 18 U. S. C. §3500. Yet the trial court (R. 261-2), the Court of Appeals (R. 856-7), and the Government (brief in opposition, pp. 15-16) talk as if 18 U. S. C. §3500, despite the fact that it does not deal with grand jury testimony one way or the other, somehow repealed *United States* v. *Rosenberg,* 245 F. 2d 870

(3d Cir. 1957), and placed grand jury testimony in a pre-*Jencks* posture.

It is perfectly clear from the legislative history of 18 U. S. C. §3500 that Congress intended to leave grand jury transcripts where it found them. Thus in the discussion of the bill on the floor of the Senate, 103 Cong. Rec. 15933 (Aug. 26, 1957), appears the following statement:

> "Mr. Clark. • • • Let us make it clear that we are talking only about records of statements made to a Government agent. Grand jury proceedings could not possibly be based upon the provisions of the bill, because a grand jury is not a Government agent. • • •"

The Conference Report on the bill notes that the conferees agreed to "eliminate specific reference to the Federal Rules of Criminal Procedure," H. Rep. No. 1271, 85th Cong., 1st Sess. (Aug. 30, 1957), 2 U. S. Code Cong. & Ad. News 1869-70 (1957).

In presenting the Conference Report to the House of Representatives, Hon. Emanuel Celler, one of the managers of the bill, stated, 103 Cong. Rec. 16738 (Aug. 30, 1957):

> "The proposed legislation is not designed to touch in any way the decision of the Supreme Court insofar as due process is concerned. It seeks only to set up a procedural device for the setting of standards of interpretation for safeguarding the needless disclosure of confidential information in Government files and, at the same time, assuring defendants access to the material in those files pertinent to the testimony of the Government witness. In doing this we are not seeking to nullify or curb the Federal Rules of Criminal Procedure. We are simply attempting to provide a procedural process.

> In doing so, this procedure concerns itself with and limits itself to those kinds of statements—to those of Government witnesses or prospective Government witnesses made to agents of the Government and no other kinds of statements, documents, and so forth."

It is thus apparent that there was no intent by Congress to deal with grand jury transcripts.

It is true that an earlier report, Senate Report No. 981, 85th Cong., 1st Sess. (Aug. 15, 1957), 2 U. S. Code Cong. & Ad. News 1861, 1862 (1957), states that the committee rejects:

> "any interpretations of the Jencks decision which would provide for the production of entire investigative files, grand jury testimony, or similar materials."

The Senate Report also includes *United States* v. *Rosenberg,* 245 F. 2d 870, in its list of "misinterpretations and misunderstandings" of the *Jencks* decision, 2 U. S. Code Cong. & Ad. News 1863 (1957). However, the appendix to the report states:

> "It should be noted that grand jury testimony is protected from disclosure by a Federal Rule of Criminal Procedure, 6(e), and it is within the discretion of the trial judge to decide when grand jury testimony is to be revealed to the defense after a proper foundation is laid. Jencks makes no reference to this rule and such a disclosure was not mentioned directly or indirectly in the opinion" (p. 1868).

Therefore, the legislative history, as well as the face of the statute, makes it perfectly clear that 18 U. S. C. §3500 does not have, and was not intended to have, any bearing on the question of whether grand jury testimony was subject to production. The fact that a congressional

committee may have disagreed with the *Rosenberg* case can have no effect since Congress expressly disavowed any intent to legislate concerning grand jury testimony. 18 U. S. C. §3500 is irrelevant to the present issue.

POINT III.

THE "ENDS OF JUSTICE" AFFIRMATIVELY REQUIRED THE TRIAL COURT TO ORDER PRODUCTION OF THE GRAND JURY TESTIMONY OF THE PRINCIPAL WITNESS FOR THE PROSECUTION.

A. The facts.

It has already been shown that Jonas was the only Government witness whose testimony purported to connect PPG to the conspiracy. It has also been shown that his testimony as to one of the two incidents by which he sought to implicate PPG—his alleged telephone calls to Prichard after the meeting at The Bluffs—was emphatically denied by Prichard. The importance of Jonas' grand jury testimony is obvious. It is of general importance—but specifically there is the unanswered question: "Did Jonas testify before the grand jury about those alleged telephone calls to Prichard, and if so, what did he say?"

More is yet to be said on the "particularized need" of PPG for Jonas' grand jury testimony. The whole atmosphere of the trial was suggestive of judicial preconception of guilt and of judicial solicitude for the Government's principal witness, Jonas.

The court was aware long before the trial that A. G. Jonas was to be a key witness for the prosecution. This fact was brought out at pretrial hearings during which PPG *unsuccessfully* sought to get from the trial court a statement that it was proper for Jonas to talk to counsel

for PPG in view of Jonas' statement that he had been told by Government counsel not to talk to defense counsel (R. 745-9).

During Jonas' testimony at the trial it was developed on cross-examination that he was a principal stockholder of Lenoir Mirror Company and that O. W. Slane Glass Company, one of the companies Jonas said he would "take care of" after the meeting at The Bluffs (R. 246-7), also had a substantial financial interest in that company. When defense counsel tried to cross examine Jonas on possible promises of immunity for these companies in exchange for his testimony, the trial court was alert to protect him:

> "Q. Do you know why the Slane Company and the Lenoir Company were not indicted in this case?
> A. No, sir.
> "Mr. Karp: I object.
> "The Court: Objection sustained" (R. 274).

This ruling, complained of on appeal to the Court of Appeals, is contrary to the principle that defendants are entitled to considerable latitude in cross-examination as to bias or self-interest on the part of a witness, *Alford* v. *United States,* 282 U. S. 687; *Asgill* v. *United States,* 60 F. 2d 776 (4th Cir. 1932); *Sandroff* v. *United States,* 158 F. 2d 623 (6th Cir. 1946), *cert. denied,* 338 U. S. 947.

At the close of the trial the defendants requested an instruction to the jury that Jonas' testimony should be received with caution in view of the fact that he was a self-confessed accomplice or co-conspirator (R. 417-8, 703-4). This instruction was refused (R. 422-4). Yet an admonition that testimony of an accomplice or co-conspirator should be received with caution is generally desirable, *Caminetti* v. *United States,* 242 U. S. 470, 495 (R. 854).

As to Prichard's contradiction of Jonas' testimony the trial court found that contradiction "immaterial" (R. 422-3, 481). This ruling illustrates the inadequacy of inspection by the court, since the trial court might well have considered Jonas' grand jury testimony, or lack of testimony, about calls to Prichard not an "inconsistency" requiring inspection by PPG but rather an "inconsequential deviation" (R. 857).

It has been held that reversal is mandatory whether or not there was a determination of prejudice when the trial court fails to make available prior statements of a witness, *Bergman* v. *United States,* 253 F. 2d 933, 935 (6th Cir. 1958). We need not go this far. Jonas, the key witness, the contradicted witness, the self-confessed conspirator, the competitor, the witness protected by the court throughout the trial and even before the trial began, the witness who stands uncorroborated on a vital point—there can be no question of the particularized need of PPG for access to his grand jury testimony and of the prejudice to this defendant in the denial of access.

B. Unfairness of a double standard.

The historic function of the grand jury is to investigate the commission of crimes and, if sufficient evidence exists, to indict. Once the indictment is returned the grand jury's work with respect to that case is ended.

There is nothing inherent in the grand jury process which requires that testimony before the grand jury shall be available to the prosecution for use at the trial. However, the Government commonly has a stenographic transcript made of grand jury testimony and treats this transcript as if it were an executive document like an F. B. I.

report. The grand jury transcript is used freely in the preparation for the examination of witnesses appearing at the trial. In the present case this was done with the witness Jonas, as the following colloquy shows:

> "The Court: What have you with regard to any statements made by Mr. Jonas prior to this trial? I don't assume that you are examining from memory.
>
> "Mr. Karp: I have notes. There are grand jury transcripts which I have analyzed" (R. 251).

The prosecution also uses grand jury testimony to "refresh the recollections" of witnesses whose trial testimony is not satisfactory, as was done, for instance, in the *Socony-Vacuum* case. See also Lewin, *The Conduct of Grand Jury Proceedings in Antitrust Cases*, 7 Law & Contemp. Prob. 112, 132 (1940).

Under the practice followed in the trial court, the attorneys for the prosecution can, and perhaps do, lead a witness like Jonas through a maze of facts, touching only upon those which aid the Government's case, and omitting those which do not, skirting dangerous areas carefully. They can do this secure in the thought that grand jury secrecy will prevent the defendant from ever finding out anything embarrassing in the grand jury testimony; but if the witness strays, they have the grand jury testimony ready to "refresh his recollection".

This double standard is wrong. To seal in secrecy from the accused the grand jury testimony of a witness at the trial is to give that testimony the status of an *ex parte* deposition. The unfair tactical advantage which this practice gives the prosecution bears no relation to the proper function of the grand jury. This Court has said that "the most valuable function of the grand jury" while it is

still sitting is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused." *Hoffman* v. *United States*, 341 U. S. 479, 485. It is anomalous that after the grand jury is discharged the fruits of its investigation should then become an exclusive tactical weapon of the prosecution at the trial.

The application of this double standard as between the prosecution and the defense violates elementary principles of fairness and justice.

C. The grand jury as an arm of the court.

Grand jury transcripts are court papers. Characterizations of the relation between court and grand jury are numerous. The grand jury has been called an appendage of the court, *Ex parte Savin*, 131 U. S. 267, 277, and an arm of the court, *Carlson* v. *United States*, 209 F. 2d 209, 213 (1st Cir. 1954), and, as noted earlier, a judicial inquiry of the most ancient lineage, *Cobbledick* v. *United States*, 309 U. S. 323, 327. See also *Wilson* v. *United States*, 77 F. 2d 236 (8th Cir. 1935), *cert. denied*, 295 U. S. 759, and the cases there discussed.

In no sense is the grand jury an arm of the prosecution. As stated by Mr. Justice Whittaker in his concurring opinion in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 684-5:

> "The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators, nor are they entitled to possession of them in such a case. Instead those documents are records of the court."

See also *Durbin* v. *United States*, 221 F. 2d 520 (D. C. Cir. 1954); *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 202 (D. N. J. 1955).

It follows, therefore, that in dealing with grand jury testimony the court is dealing with its own papers, not with files subject to any claim of executive privilege. Thus if the ends of justice require production, the court need not take into account extraneous considerations of national security, etc., on which the executive branch of the Government can justly claim to be heard. This principle was recognized in *United States* v. *Remington,* 191 F. 2d 246, 251 (2d Cir. 1951), *cert. denied,* 343 U. S. 907:

> "Even if the prosecution's use of the allegedly perjurious answer did not, by itself, open the door to the rest of the defendant's testimony, we think he was entitled to it under the principle of this court's decision in United States *v.* Andolschek [142 F. 2d 503, 506]. We there held that an accused must be given access to his own official reports which might directly support his defense, even though disclosure of such reports was forbidden by a valid administrative regulation. *A fortiori,* access should not be denied where, as here, inspection of the grand jury minutes is a matter within judicial discretion. We see no good reason for suppressing the evidence under these circumstances."

The rationale of *Jencks* was that justice requires that relevant and material evidence in the form of prior statements given by a witness for the prosecution to the executive branch of the Government must be made available to the defendant for use in cross-examination. There could be no possible logic to a rule which nevertheless withheld from the defendant similar relevant and material evidence in the court's own records.

If "justice requires no less" than production of reports of Government witnesses to the F. B. I. on the subject matter of their testimony, as the *Jencks* case holds, then a fortiori "the ends of justice require", in the language of

the *Socony-Vacuum* case; the disclosure in the present circumstances of the grand jury testimony of the principal witness for the Government on the same subject matter as that of his trial testimony.

Conclusion.

For the reasons stated the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A.

United States Code, Title 15—Commerce and Trade.

§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, §1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693.)

APPENDIX B.

United States Code, Supplement V, Title 18 Crimes and Criminal Procedure.

§3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication

of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means——

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. (Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.)

APPENDIX C.

United States Code, Supplement V, Title 18 Crimes and Criminal Procedure.

Chapter 237. RULES OF CRIMINAL PROCEDURE.

Federal Rules of Criminal Procedure for the United States District Courts.

As amended to November 12, 1957.

Rule 6. The Grand Jury.

• • •

(e) *Secrecy of Proceedings and Disclosure.*

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.